Supreme Court, U.S.
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CASE NO. [redacted]

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1994

William Patrick Pointon, Jr., Petitioner

v.

City of Choctaw, Oklahoma; State of Oklahoma, ex rel.; Oklahoma State Department of Health, Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

I. QUESTION PRESENTED

1. Whether Petitioner has failed to conform to the rules of this Court and this Court should deny review of this matter.

2. Whether Petitioner has stated any reasons for the Court to exercise its discretion to review this matter.

3. Whether the District Court abused its discretion in denying an award of attorneys fees to Petitioner.

II. PARTIES

1. The list of parties appears in the caption of this case. The Defendants in this case are both public entities; and, as such, there are no parent companies or non-wholly owned subsidiaries.

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IV. OPINIONS BELOW

This appeal is brought pursuant to In re:William Patrick Pointon, Jr.; William Patrick Pointon, Jr. Plaintiff-Appellant v. City of Choctaw, Oklahoma; State of Oklahoma, ex rel.; Oklahoma State Department of Health, Defendants-Appellees. No.94-7053 (D.C. No. CV-93545)(E.D. Okla.)(Ct. App. 10th Cir.), March 28, 1995; rehearing denied, May 2, 1995.

V. GROUNDS FOR JURISDICTION

(1) Petitioner has filed a document titled "Notice of Appeal to the Supreme Court of the United States,", rather than a Petition for Writ of Certiorari. Petitioner states that this Appeal is brought pursuant to 28 U.S.C. § 1253. Appellee asserts that Pointon, in his attempt to appeal a decision of the United States Court of Appeals for the Tenth Circuit denying Pointon attorneys' fees, has not properly invoked the jurisdiction of this Court through this statute which addresses direct appeals from decisions of district courts of three judges. Appellees assert that jurisdiction of this Court would be invoked through 28 U.S.C. § 1254. Petitioner Pointon would have 90 days after entry of judgment from the United States Court of Appeals to file this petition, pursuant to Rule 13 of the Supreme Court Rules.

VI. STATUTES AND RULES

28 U.S.C. § 1927

Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United

States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excessive costs, expenses and attorneys' fees reasonable incurred because of such conduct.

Rule 10, Rules of the Supreme Court of the United States

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States Court of appeals has rendered a decision in conflict with the decision of another United States Court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 11(c), Fed. R.Civ. P.

> Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

VII. STATEMENT OF CASE

The Court of the United States for the Eastern District of Oklahoma sustained a Summary Judgement entered by the Bankruptcy Court finding that William Patrick Pointon, Jr.'s (Pointon) discharge in bankruptcy relieved him from responsibility for complying with an order previously entered in 1984 in the District Court of Oklahoma County, State of Oklahoma, Case No. CJ-81-5471, which ordered Pointon to take certain steps to accomplish a clean-up of a sewer lagoon he had built for a subdivision in 1961. The bankruptcy court held that the 1984 order constituted a dischargeable debt which was discharged. The City of Choctaw and the Oklahoma State Department of Health appealed the ruling to the district court which ruled in favor of Pointon. Pointon then filed his Application for

Attorney Fees, Sanctions, and Contempt Citation, pursuant to 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and E.D. Okla. R.6, arguing that the City and the OSDH should not have pursued enforcement of the 1984 order in light of the bankruptcy. The United States District Court for the Eastern District of Oklahoma, without benefit of a response to Pointon's Application, entered a minute order, denying Pointon's application in its entirety "for the reason the Court cannot find that this appeal was frivolous, vexatious, or in bad faith." Pointon then appealed from that order denying attorneys' fees to the Tenth Circuit which reviewed the district court's denial of attorney's fees for abuse of discretion. The Tenth Circuit, on March 28, 1995, issued an order concluding that it "cannot find that the district court abused its discretion in holding that the appeal to that court was not frivolous, vexatious, or in bad faith," and affirming the judgment of the United States District Court for the Eastern District of Oklahoma. Pointon sought rehearing which was denied by the Tenth Circuit May 2, 1995. On May 15, 1995, Appellees received an unstamped

document titled "Notice of Appeal to the Supreme Court of the United States," stating that an appeal is brought from the Order denying rehearing, pursuant to 28 U.S.C. § 1253. Appellees are responding to that "Notice" within the 30 day time frame required for Petitions for Writs of Certiorari in a conservative effort to be responsive to the requirements of this Court; however, such response does not constitute a waiver of any objections to the method or format Petitioner has utilized in presenting this appeal which are addressed below.

VII. SUMMARY OF ARGUMENT

Appellees content that Appellant Pointon has not properly presented to this Court a Petition for Writ of Certiorari and has not conformed to the Rules of this Court and review should be denied. In the event that this Court should grant a review of the decision of the Tenth Circuit, then Appellee contends that the decision should be affirmed, on the grounds that the District Court did not abuse its discretion in denying Pointon's application and that Appellees' actions to seek enforcement of the 1984 order were not frivolous, vexatious, or in bad faith,

because whether injunctive orders constitute "claims" so as to be dischargeable in bankruptcy are debatable questions, because Pointon raised the issue in his declaratory judgment action, and because the Appellees were acting in pursuit of the public health, safety, and welfare.

IX. ARGUMENT

A. Petitioner has failed to conform to the Rules of this Court and this Court should deny review of this matter.

Petitioner has filed a document titled "Notice of Appeal to the Supreme Court of the United States, " rather than a Petition for Writ of Certiorari, as provided in 28 U.S.C. § 1254. In the document, Pointon states that the appeal is brought pursuant to 28 U.S.C. § 1253. However, that section addresses appeals from three-judge district courts in injunctive matters. Petitioner has failed to include the information, in content or format, required by the rules of this Court addressing Petitions for Writ of Certiorari, especially Rules 12, 13, 14, and 24. The mandatory use of the word "shall" in Rule 14 evinces the clear intent that petitions must conform to these requirements. This paucity of information has rendered it virtually

impossible for this Court to assess this matter and for the Appellees to respond except to speculative and anticipated issues and arguments.

B. Petitioner has failed to state any reasons for this Court to exercise its discretion.

In the event this Court should determine that Petitioner's Notice of Appeal is properly filed, then Appellees submit that the ruling of the Tenth Circuit is in accord with established precedent in related decisions and this Court should deny Petitioner's request for review. Pursuant to Rule 10, Rules of the Supreme Court of the United States, review on a writ of certiorari is a matter of judicial discretion to be granted "only when these are special and important reasons" for review. Petitioner has failed to state any reasons and an analysis of the case clearly reveals that none exist. In Rice v Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 755 Ct. 614, 99 L Ed. 897 (1955), the Supreme Court stated that "special and 'important reasons' imply a reach to the problem beyond the academic or the episodes." Petitioner has not met this criterion. Awards of costs, expenses, and attorneys' fees, pursuant

to 28 U.S.C. § 1927 and Rule 11, F. R. Civ. P., are awarded at the Court's discretion. Powell v. National Football League, 139 F.R.D. 381 (D. Minn. 1991). Sanctions imposed by a bankruptcy court under federal statute for an attorney's alleged unreasonable or vexatious multiplication of proceedings are reviewed under an "abuse of discretion" standard. See Continental Trend Resources, Inc. v. OXY USA Inc., 44 F. 3d 1465, 1483 (10th Cir. 1995). In the Matter of COHOES Industrial Terminal, Inc., 931 F. 2d 222 (2nd Cit. 1990); Apex Oil Company v. Belcher Company, 855 F. 2d 1009 (2nd Cir. 1988).

C. No fees can be awarded without a finding of bad faith.

The Court, in Moore v. Western Surety Company, 140 F.R.D. 340 (N.D. Miss. 1991), at p., 349, held:

> Thus an award of attorney fees under § 1927 'must be of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation.'

The Court went on to state:

> In this circuit sanctions under Section 1927 are imposed when 'the claim advanced is unreasonable or

> is not brought with a reasonable good faith belief that it is justified.'

A similar requirement was made in the case of Hackman v. Valley Fair, 932 F. 2d 239 (3rd Cit. 1939), at p. 232, wherein the Court found:

A finding of willful bad faith on the part of the offending lawyer is a prerequisite for imposing attorney fees under this provision (addressing 28 U.S.C. § 1927). Bad faith is a factual determination reviewable under the clearly erroneous standard. Once a finding of bad faith has been made, the appropriateness of sanctions is a matter entrusted to the discretion of the district court.

In the case of Dreiling v. Peugeot Motors of America, Inc., 768 f. 2d 1159 (10 Cir. 1985), the Court held:

Under § 1927 a district court may assess an award of fees against an attorney appearing before the Court if (1) the actions of the attorney multiply the proceedings and (2) the attorney's actions re vexatious and unreasonable. (citations omitted) An attorney's actions are considered vexatious and unreasonable under § 1927 if the attorney acted in bad faith.

The Court also held:

> The power to assess costs against an attorney under § 1927, however, is a power that must be strictly construed and utilized only in instances evidencing a 'serious and standard disregard for the orderly process of justice.'

The Court then stated that the finding of a District Court in assessing an attorney's liability under § 1927 would not be set aside on

appeal unless the court established that the findings were clearly erroneous. In the instant case, the District Court found that the appeal was not frivolous, vexatious, or undertaken in bad faith. This decision was affirmed by the Tenth Circuit which stated that it "cannot find that the district court abused its discretion in holding that the appeal to that court was not frivolous, vexatious, or in bad faith."

In the March 28 Order, the Tenth Circuit stated:

> Appellees argued on appeal to the district court that the 1984 order could not properly have been discharged because it was not a 'claim;'within the meaning of the Bankruptcy Code. See 11 U.S.C. §101(5)(B). Whether an order for injunctive relief is a claim within the meaning of the Bankruptcy Code is a debatable question. See United States v. The LTV Corp.(In Re Chateaugay Corp.), 944 F.2d 997, 1008 (2d Cir 1991)(discussing types of injunctions that do or do not constitute a 'claim' under 11 U.S.C. §101 (4)(B) [now § 101(5)(B)]). In addition, appellees' argument was invited by Pointon, who raised the issue of dischargeability in his declaratory judgment

> action. United States v. Burson, 952 F.2d 1196, 1203 (10th Cir. 1991)(holding that invited error doctrine 'prevents a party who induces an erroneous ruling from being able to have it set aside on appeal'), Cert. Denied, 112 S. Ct. 1702 (1992)."

The City of Choctaw and the State of Oklahoma have attempted to eliminate the public health, safety, and environmental problems created by the sewer lagoon owned by Pointon. Certainly the efforts of these two public bodies to enforce an order requiring Pointon to clean up these problems could not be construed to be in bad faith, frivolous, or vexatious.

In In Re: Chateaugay Corp., 944 F. 2d 997, 1002, (2d Cir. 1991), the Court addressed the conflict that may exists between the Bankruptcy Code and efforts to clean up the environment:

> We agree that the Bankruptcy Code and CERCLA point toward competing objections. The code aims to provide reorganized debtors with a fresh start, an objective made more feasible by maximizing the scope of a discharge. CERCLA aims to clean up environmental damage, an objective that the enforcement agencies in

> this litigation contend will be better served if their entitlement to be reimbursed for CERCLA response costs based on pre-petition pollution is not considered to be a 'claim' and instead may be asserted at full value against the reorganized corporation.

The 1984 order did not grant a money judgment against Pointon, nor directly require expenditures of funds by Pointon, and these public bodies, in pursuing Pointon, contended that there was a distinction between the debts discharged and Pointon's obligation to comply with the 1984 Order and deal with the health, safety and environmental problems which continued to exist after the bankruptcy because of a continuing discharge of sewage into the sewage lagoon. Even though the Court determined that Mr. Pointon's only method of complying with the clean up order was an expenditure of funds and, as such, his obligation was discharged, the Court did not find that the Appellee's actions had been undertaken in bad faith, vexatiously, or frivolously. The decision of the Tenth Circuit was in accord with the holdings of other courts on similar matters.

CERTIFICATE OF SERVICE

I, hereby certify that I am counsel of record for the Respondent and that on the 13 day of June, 1995, three (c) correct copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed, postage prepaid, to the following:

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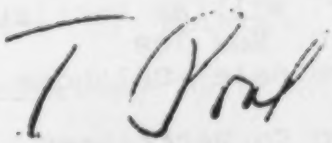
Appellees assert that Appellant Pointon's request for review should be denied.

X. CONCLUSION

For the reasons stated herein, Appellees respectfully assert that Appellant Pointon's request for review by this Court be dismissed and denied.



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